

The Increasing Division Between Legal Practice and Legal Education

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BOTH legal practice and legal education are industries, and they change over time as other industries change. In the last twenty-five years, there has been a tremendous increase in sophistication and specialization in both legal practice and legal education. We have every reason to believe that this trend will continue into the future.

The increase in sophistication and specialization, however, has led to an increasing distance between legal practice and legal education. Legal practice has become specialized and sophisticated in legal analysis and its application to the legal system. Legal education, in contrast, has become specialized and sophisticated in the application of the social sciences and social theory to criticize legal analysis and the legal system.

There is a tremendous difference between legal practice dominated by traditional legal scholarship and legal education dominated by the social and behavioral sciences and by social theory. It is not the difference between practice and theory itself. Traditional understanding in the law or in any other field derives from theories. Those lawyers now regarded as traditional were theorists. Holmes was a theorist. Williston was a theorist. Frances Bohlen was a theorist. Corbin, the anti-theorist, was a theorist: his theory emphasized the need for judicial sensitivity to the details of difficult problems.

What has changed in the modern world is that, while the theories and organizing structures of traditional legal practice are theories about law and are only applicable to law, the theories of modern legal education are theories of economists, critical scholars, and sociologists. They are theories about behavior or about understanding in which law has no special place.

The most important modern change between the theories underlying legal practice and the theories underlying modern legal scholarship relates to the respective source of the theories. Historically, the theories of traditional legal practice, because relevant only to legal phenomena, were developed only in law schools. The work of the law schools and the concerns of the bar were largely identical. Today, however, the theories that

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dominate modern legal scholarship are the theories of modern social science or social criticism, and their source is quite independent of law schools. These theories are developed in departments of social sciences or the humanities by a set of independent scholars. Most importantly, these scholars from other disciplines, because they are not burdened by the mastery of the legal system's details, proceed at a much faster pace and with much greater range than lawyers. The most important difference between the legal scholarship of today and that of twenty-five years ago is the tremendous increase in the velocity of ideas relevant to the law.

The implications of the greater velocity of modern legal scholarship are substantial. Greater velocity in legal scholarship generates increasing distance between the bar and the school. At present, the practical concerns of the lawyer and the theoretical concerns of the legal scholar diverge further than ever before. And the divergence is accelerating. Twenty years ago, pillars of the legal community could look to the law schools from which they had graduated and see a curriculum that largely resembled the one that they had studied. Today, the bar may see some of the same course names, but the content of these courses is totally different—in fact, incomprehensible to many in the modern bar.

The lawyer who studied contracts reading Williston and Corbin will have little mastery of transaction cost economics and opportunistic behavior, not to mention of the essential tension and the contingent nature of obligation. The lawyer who studied torts from the work of Bohlen or Green or even Prosser may have been aggressive enough to teach himself or herself about least cost avoiders, but will hardly have heard of reverse Learned Hand rules or adverse selection in third-party insurance markets. The lawyer whose corporations training included the then-novel theories of Berle and Means will be hard-pressed to discuss the capital asset pricing model, or to explain why a solution to the puzzle of capital asset discounts is central to the regulation of mergers and acquisitions.

This increasing distance between the bar and the law school creates difficult problems of bar accreditation; problems that are especially difficult for a state law school. Private law schools must be responsive—however vaguely—to the market, and they can justify their scholarly innovations in terms of law school competition. State law schools, in contrast, must be responsive to state legislatures, whose most interested members are its graduates of twenty to twenty-five years before. As the velocity of scholarship increases, the divergence between what the legislator and the faculty believes to be important increases dramatically.

This leads to a peculiar position for the concerned legislator. The

legislator may find the curriculum and the scholarship of a state law school to be heretical and radically deconstructive; indeed, antithetical to everything the legislator was taught and believes in. But heresy with respect to ideas of the past is the sign of a vibrant law school. The most useful accreditation rule for a state legislator should be, that if a law school's curriculum does not appear heretical, it should be denied funding.

This increasing velocity of ideas also affects matters internal to the law school. It leads to an increasing rate of faculty obsolescence. There is always obsolescence in any intellectual activity, as scholars exhaust their ideas or as the prospect of further footnotes overwhelms remaining energy reserves. Scholars in such positions cede their role as explorers of the frontier to younger colleagues, and law schools adjust by giving older scholars other assignments. It is little surprise that the best prepared law teachers and the most dedicated law school administrators are the most traditional of former scholars.

With the increase in the velocity of ideas, however, this pattern accelerates. The rift between the ambitious and the settled becomes greater. There is a greater appearance that younger scholars are rebelling against their only slightly older colleagues.

The great divisions we see today among the major law schools—in particular, at Harvard and Stanford—are prominent examples. These divisions are very commonly analyzed in terms of political divisions between the legal right and the legal left. But, the political dimension masks what is a more important division between styles of legal scholarship. The difference between modern theorists and traditionalists, between those who are pressing to change ideas about how the law is understood and those clinging to tradition, is at the true heart of these debates. The difference between critical legal scholars and law and economics scholars is smaller than most people appreciate. The more important division is between modern theorists—scholars employing the social sciences and social theory—and traditionalists, or, those who have been made traditional by the advance of modern ideas.

Over the next twenty-five years, these trends will accelerate. The distance between the bar and the law school will become greater. The obsolescence of the law faculty will increase. Divisions within the law schools and battles over faculty appointments will escalate. Some may view these trends, as many do today, as signaling the disintegration of the academy. Far from disintegration, they are a sign of intellectual progress and advance.

